

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

RICHARD BRYAN and LINDA BRYAN,
husband and wife, d/b/a Bryan)
Appraisals,)

NO. CV-04-3102-LRS

Plaintiffs,)

- VS -

PFAU, INC., a Washington corporation; and DONOVAN T. PFAU and JANE DOE PFAU, husband and wife, and their marital community,

ORDER GRANTING IN PART
DENYING IN PART DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT;
DENYING MOTION TO DISQUALIFY;
DENYING IN PART GRANTING IN
PART DEFENDANT'S MOTION TO
STRIKE

Defendants.)

On September 23, 2005, the Court held a hearing to hear argument on Defendants' Motion for Summary Judgment (Ct. Rec. 30), Defendants' Motion to Strike Portions of Plaintiff's Declaration in Opposition to Summary Judgment Motion (Ct. Rec. 52), and Defendants' Motion to Disqualify Counsel James Perkins (Ct. Rec. 49). James Perkins participated on behalf of the plaintiffs and Floyd Ivey participated on behalf of the defendants. At the conclusion of argument, the Court ruled orally on the record. This Order is entered to memorialize and supplement the Court's oral ruling.

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1 **IT IS HEREBY ORDERED:**

2 1. Defendants' Motion to Strike (Ct. Rec. 52) is GRANTED as to
3 Exhibit One attached to the Perkins' Declaration and Exhibit Three
4 attached to Perkins' Declaration. Exhibit One is offered for
5 illustrative purposes only and thus should not be part of the record, and
6 Exhibit Three is irrelevant to the Court's determination of the summary
7 judgment motion as authorship is not an issue in dispute. Defendants'
8 motion is **DENIED** as to the various aspects of Richard Bryan declaration
9 as the Court finds it unnecessary to rely on those disputed portions of
10 the record in deciding the summary judgment motion.

11 2. Defendant's Motion to Disqualify James Perkins (Ct. Rec. 49) is
12 **DENIED** because the challenged testimony relates to an issue that is
13 uncontested or a formality, the disqualification of the lawyer would work
14 a hardship on the client, and the likelihood of the lawyer being a
15 necessary witness in this case is not reasonably foreseeable.

16 3. Defendants' Motion for Summary Judgment is **GRANTED** in **PART** and
17 **DENIED** in **PART** as follows:

18 a. The Court finds the plaintiff has provided sufficient evidence
19 of a valid copyright to go forward with his claim of copyright
20 infringement. Moreover, it is undisputed the copyrighted material is
21 original to the author and fixed in a tangible medium of expression.

22 b. The Court denies the defendants' motion for summary judgment on
23 the grounds of non-infringement. It has not been demonstrated that the
24 similarities concern only noncopyrightable elements of plaintiff work,
25 or that no reasonable trier of fact could find the works substantially
26 similar.

1 c. The Court cannot determine at this stage of the litigation
2 whether any of the plaintiffs' claims are time barred as a question of
3 fact exists as to when the plaintiffs discovered or should have
4 discovered the alleged infringement and thus when the claims accrued.
5 See *Polar Bear Productions v. Timex Corp.*, 384 F.3d 700, 705-07 (9th Cir.
6 2004) (rejecting the argument that recovery is barred for infringement
7 occurring three years prior to the *filing* of the copyright action).

8 d. The plaintiffs have conceded they will not seek statutory
9 damages in this case. In light of this concession, defendants' Motion
10 for Summary Judgment is GRANTED as to any claims for statutory damages,
11 attorney fees pursuant to 17 U.S.C. § 505, and punitive damages.
12 Accordingly, the issues of "one work" and innocent infringement need not
13 be addressed by the Court.

14 e. The Court finds a question of fact exists regarding the value of
15 the copyrighted addendum and thus the Court can not find as a matter of
16 law at this time that there are no actual damages.

17 4. On May 6, 2005 the Court entered an order staying discovery until
18 the resolution of this initial round of motions. In addition, due to the
19 stay, this matter has not been set for trial. The Court also
20 specifically reserved ruling on that portion of Defendants' Motion to
21 Limit Discovery (Ct. Rec. 19) regarding defendants' appraisals, tax
22 returns, and depositions. A telephonic hearing will be held on **DECEMBER**
23 **2, 2005 at 8:30 a.m.** to address these matters. The parties are to call
24 the Court's public conference line (509-376-1330) at the time of the
25 hearing.

1 Prior to the hearing, the parties shall meet and confer to discuss
2 a proposed litigation plan for this case. On or before **November 25, 2005**
3 counsel shall file, either jointly or separately, a status certificate
4 regarding their proposed litigation plan and also explicitly addressing
5 the following five issues:

- 6 a) Proposed discovery cut off and trial dates.
- 7 b) The bifurcation of trial by issues of liability and damages.
- 8 c) Appraisals/Protective Order

9 The plaintiffs and defendants are business competitors and the
10 appraisals sought in this matter contain confidential information
11 identifying financial institutions and others who have requested his
12 services. Mr. Pfau appears to have an underlying fear of the defendants'
13 release of confidential commercial information could damage Mr. Pfau's
14 business. The defendants concern about the disclosure of the information
15 contained in his appraisals in this case is legitimate and one that is
16 recognized under Fed. R. Civ. P. 26(c)(7). However, statistical
17 sampling, as suggested by the defendants, is a system generally utilized
18 in the mass tort and complex litigation scenario and may not be the
19 appropriately tailored solution to the concerns of this case.

20 On the other hand, it seems a protective order may be useful. The
21 parties shall make a good faith effort to stipulate to an appropriate
22 protective order and file such stipulation with the Court prior to the
23 December 2, 2005 hearing. If no stipulation can be agreed to each side
24 shall provide a separate proposal for consideration by the Court on or
25 before **November 25, 2005.**

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d) Tax Returns

It has been suggested that plaintiffs will seek the disclosure of defendants' tax returns for purposes of calculating damages. There is a public policy of confidentiality of tax returns. To require their discovery, a party must establish relevancy and the court must find a compelling need for the returns because the information is not otherwise obtainable.

e) The need to take additional depositions.

9 **IT IS SO ORDERED.** The District Court Executive is directed to file
10 this Order and provide copies to counsel.

DATED this 24th day of October, 2005.

s/Lonny R. Suko

LONNY R. SUKO
UNITED STATES DISTRICT JUDGE